Petition

Supreme Court, U.S.
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No. 81-1766

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

UNITED TECHNOLOGIES CORPORATION

Petitioner,

against

ELEANOR M. FIACCO, etc., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the Court of Appeals' refusal to grant United Technologies Corporation's petition for a Supervisory Writ of Mandamus so far departed from the accepted and usual course of judicial proceedings, as well as sanctioning such a departure by the district judge, so as to constitute reversible error and call for the exercise of this Court's power of supervision where, under the facts and circumstances of this case, the district judge lacked any discretion to deny petitioner's motion to dismiss on *forum non conveniens* grounds, made almost three years before, after the Court of Appeals and two other Courts of Appeals affirmed the dismissals on such grounds of several companion actions involving the same facts and issues, and where such prior dismissals represented the law of the case binding on the district judge below?[1]

[1]All the parties to the proceeding in the United States Court of Appeals for the Second Circuit are listed in the caption of the case appearing on page 1 of this petition. Because of the number of subsidiary and affiliate companies of petitioner United Technologies Corporation they are separately listed in the appendix to this petition. A-10

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

UNITED TECHNOLOGIES CORPORATION,

Petitioner,

against

ELEANOR M. FIACCO, Individually, as mother of DANIEL MARTIN FIACCO and JAY MICHAEL FIACCO, and as Administratrix of the Estate of ROBERT J. FIACCO,

and

KARI TONNENSSEN, Individually, as mother of EIVIND TONNESSEN and RUNE TONNESSEN, and as Personal Representative and Administratrix in fact of the Estate of BJORN TONNESSEN, deceased,

and

THERESE BERTHELSEN, Individually, as mother of LEONARD BERTHELSEN and TROND BERTHELSEN, and as Personal Representative and Administratrix in fact of the Estate of REIDAR OSVALD JOHAN BERTHELSEN, deceased,

and

WENCH ESPELAND, Individually, as mother of UNNI ESPELAND and JAN ERIK ESPELAND, and as Personal Representative and Administratrix in fact of the Estate of STEINAR ESPELAND, deceased,

and

KARI GJERTSEN, Individually, as mother of BENEDIKTE LOUSE GJERTSEN and ALEXANDER GJERTSEN, and as Personal Rep-representative and Administratrix in fact of the Estate of MAGNUS GJERTSEN, deceased,

and

OLGA PRESTHAUG, Individually and as Personal Representative and Administratrix in fact of the Estate of HANS PRESTHAUG, deceased,

and

ODLANG ESTHER THACKWELL, Individually, as mother of HELEN SOLVEIG THACKWELL, LISS BARBARA THACKWELL and BIBBI MARY THACKWELL, and as Personal Representative and Administratrix in fact of the Estate of JAMES ARTHUR THACKWELL, deceased.

and

MARGRETHE VERLO, Individually, as mother of MORTON GUNNAR VERLO, and as Personal Representative and Administratrix in fact of the Estate of GUNNAR VERLO, deceased,

and

MARGUN WOEBBEKIND, Individually, as mother of ANITA WOEBBEKIND, and as Personal Representative and Administratrix in fact of the Estate of Knut Morten Woebbekind, deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

The District Court's opinion is reported at 524 F.Supp. 858 (S.D.N.Y. 1981) and a copy thereof is set forth in the Appendix hereto at A-3, *infra*. The Court of Appeals' denial of petitioner's petition for a supervisory writ of mandamus and its petition for rehearing *in banc* have not yet been officially reported. However, copies of these orders are set forth in the Appendix at A-2 and A-1 respectively.

Jurisdiction

The Court of Appeals' order denying petitioner's petition for a supervisory writ of mandamus was dated and entered on October 28, 1981 (A-2). A timely petition for rehearing *in banc* was denied by the Court of Appeals, Judge Moore *dissenting*, by its order dated and entered on December 24, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statement of the Case

On June 26, 1978 a Sikorsky S-61 helicopter en route from Bergen, Norway, to an offshore oil drilling platform in the North Sea crashed off the coast of Norway killing all aboard. The helicopter was owned, maintained and operated by Helicopter Service A.S. (Helikopter), a Norwegian corporation, and was based and maintained in Norway. The helicopter was designed and manufactured by the Sikorsky division of petitioner United Technologies Corporation (UTC), a Delaware corporation doing business in New York and maintaining its principal office and helicopter manufacturing facilities in Connecticut. Among those killed in the crash were Bjorn Tonnessen, Reidear Osvald Johan Berthelsen, Steinar Epseland, Magnus Gjertsen, Hans Presthaug, Gunnar Verlo and Knut Morten Woebbekind, all residents and citizens of Norway, James Arthur Thackwell, a British citizen and resident of Norway and Robert J. Fiacco, a United States citizen and resident of Norway. The Fiacco's were citizens of Connecticut from 1961 to 1975, when they became residents of Norway. None of the plaintiffs were residents or citizens of New York at the time of the accident.

The Norwegian Civil Aviation Administration conducted an official investigation of the accident. The records of that investigation, the officials who conducted it, the flight crew records, the helicopter maintenance and operating records, and the wreckage of the helicopter itself are all located in Norway.

On August 4, 1978 Mrs. Fiacco, as the sole plaintiff, commenced her action against UTC in the U.S. District Court for the Southern District of New York; shortly thereafter the complaint

was amended to add the other eight claims. Jurisdiction of the District Court is based upon The Death on the High Seas Act, 49 U.S.C. §§761 *et seq.*, the general maritime law and diversity of citizenship. Damages are sought for the alleged wrongful deaths of decedents in theories of strict liability and negligence; punitive damages are also sought under general maritime and diversity jurisdiction.[2]

Prior to serving its Answer UTC moved to dismiss the amended complaint on the ground of *forum non conveniens;* in the alternative, defendant requested that the claims of the foreign nationals be severed and dismissed under *forum non conveniens* and that the *Fiacco* claim be transferred to the U.S. District Court in Connecticut pursuant to 28 U.S.C. §1404(a). That motion was made on October 4, 1978. *Almost three years later* the District Judge denied defendant's motion by its memorandum order entered July 29, 1981 (A-3).

After the commencement of the *Fiacco* action on August 4, 1978 three other wrongful death actions were commenced against UTC involving the S-61 helicopter. In addition to the *Pain* action, *supra,* n. 2, the *Dahl* action was commenced in the U.S. District Court, District of Delaware and the *Fosen* action was commenced in the U.S. District Court, Southern District of New York.[3]

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[2]Personal Representatives of the other passengers aboard this same flight commenced five identical actions in the U.S. District Court for the District of Columbia against United Technologies Corp. The District Court granted UTC's *forum non conveniens* motion to dismiss these actions and said dismissals were affirmed on appeal. *Pain, et al.* v. *United Technologies Corp.*, 205 U.S. App. D.C. 229 (D.C. Cir. 1980), 637 F.2d 775.

[3]*Dahl* and *Fosen* arose out of the November 23, 1977 S-61 helicopter accident which also occurred off the coast of Norway while carrying its passengers to an oil drilling platform in the North Sea. As in the *Fiacco* and *Pain* cases the S-61 was also owned, maintained and operated by Helikopter Service A.S. In *Dahl* and *Fosen* all plaintiffs and decedents were citizens and residents of Norway. Because the private interests of the litigants as well as the factors dealing with public interest in both accidents are identical, insofar as the issue of *forum non conveniens* is concerned, it is petitioner's contention that Judge Broderick in *Fiacco* was not only bound by Court of Appeals decision in *Pain* (note 2, supra) but also by the decisions of Courts of Appeals in *Dahl* and *Fosen,* all of which were decided well before his decision in *Fiacco.*

In the *Dahl* case UTC's motion to dismiss on the ground of *forum non conveniens* was granted and said dismissal was affirmed on appeal. *Dahl et al.* v. *United Technologies Corporation*, 472 F.Supp. 696 (D.Del. 1979), aff'd 632 F.2d 1027 (3d Cir. 1980). In the *Fosen* action UTC's motion to dismiss under *forum non conveniens* was also granted and that dismissal was affirmed on appeal. *Fosen et al.* v. *United Technologies Corporation*, 484 F.Supp. 490 (S.D.N.Y. 1980), aff'd memo 633 F.2d 203 (2d Cir. 1980). Copies of the District Court's decisions and orders of dismissal in *Pain, Dahl,* and *Fosen* as well as the opinions and orders of the Courts of Appeals affirming those dismissals were delivered to Judge Broderick shortly after they were filed in their respective dockets. This included a copy of the order-memo in *Collins* v. *Hilton International Co., et al.*, 628 F.2d 1344 (2d Cir. 1980), which affirmed, *sub nom,* Judge Broderick's own *forum non conveniens* dismissal in *Abouchalache v. Hilton International Co.*, 464 F.Supp. 94 (S.D.N.Y. 1978).

Thus during the time UTC's *forum non conveniens* motion to dismiss in *Fiacco* was pending before Judge Broderick the following *forum nonconveniens* cases had been decided:

> *Farmanfarmaian* v. *Gulf Oil Corporation*, 588 F.2d 880 1978), aff'g 437 F.Supp. 910 (S.D.N.Y. 1977);
> *Schertenbeib* v. *Traum*, 589 F.2d 1156 (2d Cir. 1978);
> *Alcoa S.S. Co.* v. *M/V Nordic Regent*, 654 F.2d 147 (2d Cir. 1980) (en banc), aff'g 453 F.Supp. 10 (S.D.N.Y. 1978);
> *Collins* v. *Hilton International Co.*, 628 F.2d 1344 (2d Cir. 1980), aff'g sub nom. *Abouchalache* v. *Hilton International Co.*, 464 F.Supp. 94 (S.D.N.Y. 1978) (Broderick, J.);
> *Dahl et al.* v. *United Technologies Corporation*, 632 F.2d 1027 (3d Cir. 1980), aff'g 472 F.Supp. 696 (D.Del. 1979);
> *Fosen et al.* v. *United Technologies Corporation*, 633 F.2d 203 (2d Cir. 1980) aff'g memorandum order 484 F.Supp. 490 (S.D.N.Y. 1980);
> *Pain et al.* v. *United Technologies Corporation*, 205 U.S. App. D.C. 229 (D.C. Cir. 1980), 637 F.2d 775.

In each of these cases defendant's motion to dismiss the action on the ground of *Forum non conveniens* was granted.[4] And Judge Broderick was aware of these decisions at the time he rendered his decision in *Fiacco*. See, *Dahl* v. *United Technologies Corporation*, 632 F.2d 1027, 1029-30, n. 1.

Judge Broderick's denial of the motion to dismiss on grounds of *forum non conveniens* was based upon the fact that Mrs. Fiacco was an American citizen[5] who moved to New York *after* the accident and because of an erroneous and completely irrelevant notion that plaintiffs could not obtain personal jurisdiction over UTC in Norway unless UTC first consented to such jurisdiction. Although the District Judge disclaimed according any "talismanic significance" to Mrs. Fiacco's citizenship (A-8) his emphasis on diversity jurisdiction, while ignoring the factors which make this a maritime action, is completely at odds with his own Circuit's views on the importance of American citizenship in *forum non conveniens* settings, *Alcoa S.S. Co.* v. *M/V Nordic Regent*, *supra* 654 F.2d at 154-158, as well as those of the District of Columbia Circuit in the controlling *Pain* v. *United Technologies Corporation*, *supra*, 637 F.2d at 797-798; cf. *Westwood Associates* v. *Deluxe General, Incorporated*, 53 N.Y.2d 618, 438 N.Y.S.2d 774 (1981) (action dismissed on *forum non conveniens* grounds even where *all* parties to action were New York residents).

It was the second consideration, however, which the District Judge said was "a crucial one, which tips strongly in favor of retention of jurisdiction in this district." (A-8). It was Judge Broderick's view that respondents "could not have proceeded against defendant [UTC] in Norway absent defendant's consent to submit to jurisdiction there." (A-8), 524 F.Supp.

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[4]In *Abouchalache*, 465 F.Supp. at 98, n. 7, Judge Broderick had no hesitancy in dismissing the personal injury claims of two American citizens against an American corporation.

[5]Judge Broderick ignored the citizenship of the other eight claimants and decedents. See, *Piper Aircraft Co.* v. *Reyno*, etc., *et al.*, __ U.S. __ (1981), Slip Opinion, at 19-20. He also ignored petitioner's request for alternative relief on its motion.

at 861. This "crucial" consideration is completely irrelevant, *Farmanfarmaian* v. *Gulf Oil Corporation*, 437 F.Supp. 910, 922 (S.D. N.Y. 1977), aff'd 588 F.2d 880 (2d Cir. 1978) wherein the Court of Appeals said:

> "For reasons stated in our recent opinion in *Schertenleib* v. *Traum*, 589 F.2d 1156 (2d Cir. 1978), we hold, as Judge Carter did, that there was no reason to determine whether defendants were initially subject to the compulsory jurisdiction of Iran. Once defendants consented to suit in Iran, and Judge Carter found that there was an existing alternative forum, he had the power to apply the forum non conveniens doctrine after balancing all of the relevant considerations." 588 F.2d at 882

Furthermore, the factual conclusion upon which this "crucial" consideration is based is entirely in error because UTC was in fact subject to personal jurisdiction in Norwegian courts. See, *Dahl* v. *United Technologies Corporation, supra*, 472 F.Supp. at 699, and 632 F.2d at 1030, n. 1, showing that under Norwegian law UTC is subject to jurisdiction in Norway on more than one basis. And, the Ringdal affidavit referred to in *Dahl*, 472 F.Supp. at 699, n. 16, was also submitted to Judge Broderick as part of the Reply Affidavit of John J. Martin, sworn to November 17, 1978, in support of the motion. Thus in concluding that respondents, who had a right to sue UTC in the United States, should not be required to go to Norway to maintain the action when UTC could not have been sued there in the first place without its consent, it is clear that Judge Broderick engrafted the "where it might have been brought" language of the transfer of venue statute, 28 U.S.C. §1404(a) onto the common law doctrine of *forum non* conveniens. In doing so the district judge completely ignored the Second Circuit's clear rejection of this argument in *Schertenbeib* v. *Traum*, 589 F.2d 1156, 1160-64 (2d Cir. 1978). His conclusion therefore was based upon a total absence of any facts or law to support this "crucial" consideration. The only two reasons the district judge advanced to support his denial of petitioner's motion to dismiss were em-

phatically rejected by the courts in the cases listed on page 5, *supra*.[6]

Further confusion in the district court's decision is illustrated by its query: "If there were not clear jurisdiction over defendant in this and other forums within the United States, however, query whether defendant would have been willing to submit to jurisdiction in Norway." (A-8), 524 F.Supp. at 861. Even if this assumption were in fact true[7] the willingness *vel non* of UTC to submit to jurisdiction in Norway could never be reached because consideration of a *forum non conveniens* motion by a district court presupposes the existence of subject matter jurisdiction of the action and personal jurisdiction over the defendant. If either is absent defendant's remedy is not dismissal on *forum non conveniens* grounds, rather it is dismissal based upon lack of such jurisdiction. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 506-7 (1947).

Because petitioner believed that the District Judge's denial of its *forum non conveniens* was under the circumstances so egregiously erroneous that the District Court's action amounted to a usurpation of power, UTC filed its petition in the Court of Appeals for the Second Circuit seeking the issuance of a Supervisory Writ of Mandamus directing the District Court to vacate its order denying petitioner's motion to dismiss and to grant said motion under the conditions petitioner previously agreed to: agree to

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[6]The very reasons advanced by Judge Broderick for denying petitioner's motion in *Fiacco, i.e.*, the American citizenship of one plaintiff and the assumed lack of personal jurisdiction of petitioner in the Norwegian courts, were rejected by Judge Broderick himself in *Abouchalache* v. *Hilton International Co.*, 464 F.Supp. 94, 98 n. 7 (S.D.N.Y. 1978). While apparently condemning UTC for voluntarily agreeing to submit itself to jurisdiction of the Norwegian Courts, Judge Broderick had no trouble *ordering* the defendants in *Abouchalache* to:

> ". . . consent to subject themselves to personal jurisdiction in the appropriate English court; . . ." 464 F.Supp. at 99.

Judge Broderick's opinion in *Fiacco* does not bother to explain why he condemns petitioner for doing voluntarily what he ordered done in a decision rendered after UTC's motion to dismiss was made.

[7]Judge Broderick's supposition could never be true for the simple reason that UTC is a Delaware corporation doing business in a number of States in the United States.

jurisdiction and venue in the appropriate court in Norway; agree not to contest the issue of liability in the Norwegian Court; and agree not to raise any statute of limitations defense in such action.

The Court of Appeals by its order dated and entered on October 28, 1981 denied said petition without opinion; that order is set forth in the Appendix to this Petition (A-2). A timely petition for rehearing *in banc* was thereafter filed by petitioner in the Court of Appeals and that petition was denied, Judge Leonard P. Moore, dissenting, by order dated and filed December 24, 1981; that order is also set forth in the Appendix (A-1).

Reasons for Granting the Writ

Petitioner's only remedy in its efforts to obtain in the Court of Appeals a reversal of Judge Broderick's order was by mandamus. The order was not a final order thereby permitting an appeal pursuant to 28 U.S.C. §1291. See, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). Nor was the order appealable under the Interlocutory Appeals Act, 28 U.S.C. §1292(b), according to the Second Circuit decisions in, *A. Olinick & Sons* v. *Dempster Brothers, Inc.*, 365 F.2d 439, 443 (2d Cir. 1966); *Golconda Mining Corp.* v. *Herlands*, 365 F.2d 856 (2d Cir. 1966). Although the Court of Appeals for the Second Circuit has held that a question certified pursuant to §1292(b) inappropriate in ruling on *forum non conveniens* motions "this does not mean that we could not mandamus the district judge to dismiss the action on the ground of *forum non conveniens*, Thompson v. Palmieri, 358 F. 2d 64 (2d Cir. 1966) if we thought that course appropriate." *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

Surely, effective or meaningful appellate review is not provided to petitioner by compelling it to wait until a final decision on the merits is obtained against it in the lower court before allowing petitioner to be heard on the issue of whether the case should have remained in the lower court in the first place. *Pacific Car and Foundry Company* v. *Pence*, 403 F.2d 949, 951-953 (9th Cir. 1968). Even if this Court were to agree with petitioner,

that UTC's motion to dismiss should have been granted, what sensible and proper relief could be awarded petitioner after a trial on the merits? It would be pointless under such circumstances for an appellate court to grant, after a trial on the merits, the relief that should have been granted when the motion was made.

In discussing the propriety of review by mandamus of a lower court's order denying dismissal and transfer of venue the Court of Appeals for the Ninth Circuit, in *Pacific Car and Foundry Company* v. *Pence, supra,* observed, 403 F.2d at 952:

> "In contrast the petition before us is not truly an instance of piecemeal appeal. A decision denying change of venue is complete and final in itself. It is not a step toward final judgment on the merits which will merge in such final judgment. Instead, it is collateral to and separable from the rights asserted in the main action. Venue provisions deal with rights too important to be denied review. Yet error in denying change of venue cannot be effectively remedied on appeal from final judgment. [footnote omitted] The purpose of the rule is to avoid the disruption, expense and inconvenience parties and witnesses must suffer by having the trial in an improper forum. To require litigants to await final judgment for relief serves to defeat the very purpose of the venue rule by requiring them to submit to the disadvantages from which the rule is designed to relieve them. Once trial has been completed damages cannot be collected for the extra expense suffered."

Mandamus is especially appropriate in this case because, in view of the above, petitioner has "no other adequate means to attain the relief [it] desires," *Kerr* v. *United States,* 426 U.S. 394, 403 (1976). Therefore, the denial of petitioner's request for a supervisory writ of mandamus by the Second Circuit Court of Appeals has for all intents and purposes denied to petitioner a right to effective appellate review of the District Court's actions. Under such circumstances UTC's right to the issuance of the writ by the Second Circuit was "clear and indisputable." *Will* v. *Calvert Fire Ins. Co.,* 437 U.S. 655, 662 (1978), because absent man-

damus its arguments could never be presented for effective appellate review. This is particularly true when it is considered that *if* the District Judge *granted* petitioner's motion to dismiss (instead of denying it) the plaintiffs would have had an absolute right to appeal from such final order of dismissal under 28 U.S.C. §1291. Moreover, the standard governing appellate review of plaintiffs' appeal from such a judgment would have been far less onerous than the standard imposed upon petitioner in its request for mandamus. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34 (1980).

Petitioner believes that the Court of Appeals for the Second Circuit's refusal to grant UTC's petitioner for a supervisory writ of mandamus did, under the circumstances of this case, so far depart from the accepted and usual course of judicial proceedings as well as sanctioning such a departure by the district court, so as to call for the exercise of this Court's power of supervision by the granting of UTC's petition for a writ of certiorari to the Court of Appeals for the Second Circuit. Mandamus was the *only* way UTC could obtain appellate review of the district court's actions. And mandamus was peculiarly applicable in this case.

The writ of mandamus has long been recognized as the means whereby the Court of Appeals, as well as the Supreme Court, may correct errors in those extraordinary situations where normal appellate procedure is not available. In *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957) this Court said:

> "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here."

In *La Buy* the Court upheld the appellate court's issuance of mandamus when the district court abused its power under Rule 53 (b) of the Federal Rules of Civil Procedure. In *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110-111 (1964) this Court went further in upholding the advisory power of the Courts of Appeals

to review and settle by mandamus new and important problems. See, *Miller* v. *United States,* 403 F.2d 77 (2d Cir. 1968). *Will* v. *United States,* 389 U.S. 90 (1967) is not to the contrary in spite of its narrow application of §1651(a) in that criminal action. This Court acknowledged that a "corrective and didactic function. . . . lie at the core of this Court's decisions in *La Buy* and *Schlagenhauf* v. *Holder* . . ." Id. at 107. However, the writ did not issue in *Will* primarily because of the absence of any opinion by the Court of Appeals detailing its reasons for issuing the writ. *Id.*

The Court said:

> "We fail to see how [the holding in *La Buy* and *Schlagenhauf*] can be served here without findings of fact by the issuing court and some statement of the court's legal reasoning. A mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court upon which the Government rests its attempt to justify the action below." 389 U.S. at 107.

While the Court of Appeals for the Second Circuit at one time indicated that *Will* was a curtailment of the *La Buy* and *Schlagenhauf* uses of such supervisory writs, see, *American Flyers Airline Corp.* v. *Farrell,* 385 F.2d 936 (2d Cir. 1967), that view no longer prevails and, in the appropriate circumstances that Court has exercised its supervisory powers "over the district courts to insure 'proper judicial administration in the federal system'. . . . [and] *Will* v. *United States,* 389 U.S. 90 (1967), is not to the contrary." *United States* v. *Newman,* 549 F.2d 240, 250 (2d Cir. 1977). The Second Circuit in *Newman* specifically pointed out that " 'It should be clear, however, that the [*Will*] case . . . does not represent an invalidation of uses of supervisory mandamus authorized by the model described above: on the contrary, it reaffirms the validity of those uses.' " Id. 549 F.2d at 251 quoting from Note, *Supervisory and Advisory Mandamus, Under the All Writs Act,* 86 Harv. L. Rev. 595, 622 (1973). See, also, *In Re Attorney General of the United States,* 596 F.2d 58, 63 (2d Cir. 1979).

It has been recently noted that this Court has interpreted the standard for issuance of the writ more liberally in some cases than in others. *In re Attorney General of the United States,* 596 F.2d 58, 63 (2d Cir. 1979). Much of that could be explained by the nature of the action taken in the premises by the District Court. If the degree of the alleged error is determined by this Court upon examination to be minor or even non-existent the Court would simply have no occasion to discuss the broader aspects of review by mandamus. Thus, in *Kerr* v. *United States,* 426 U.S. 394, 404-405 (1975) the Court found that petitioner had another and less drastic remedy than mandamus which could provide the relief sought. In *Will v. Calvert Fire Insurance Co.,* 437 U.S. 655, 665-666 (1978) the Court determined that the only question involved was the District Court's exercise of its discretion, which it felt "ought not . . . be overridden by a writ of mandamus." *Id.* In footnote 7 of the opinion the Court conceded, however, that the *La Buy* case, *supra,* "approved the issuance of the writ upon a *mere* showing of abuse of discretion, . . ." but the Court "warned soon thereafter against the dangers of such a practice." (Emphasis added). And, in *Allied Chemicals Corp.* v. *Daiflon, Inc.,* 449 U.S. 33, 36 (1980), where the trial court's order of a new trial was the subject of the writ, the Court said in a *per curiam* opinion that:

> "A trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of mandamus. On the contrary, such an order is not an uncommon feature of any trial which goes to verdict."

It was very clear in *Allied* that the simple exercise of the district court's discretionary power would not be permitted to undermine the policy against piecemeal appeal. And of course when the degree of error is great or the importance of the issue apparent the more liberal view dealing with review by mandamus is employed to support the issuance of the writ in a particular case. See, *e.g., United States* v. *Newman, supra; In re Attorney General of the United States, supra.*

It is petitioner's contention that at the time Judge Broderick

decided petitioner's motion to dismiss he no longer had any discretion in the matter except to grant the motion. While it is true that ordinarily a motion to dismiss on the ground of *forum non conveniens* is addressed to the sound discretion of the Court there can come a time when that discretion is lost because it is exercised by others. During the almost three year period Judge Broderick had petitioner's motion before him fourteen identical actions against UTC were commenced in federal district courts in Delaware (*Dahl*, four actions), the District of Columbia (*Pain*, five actions) and the Southern District of New York (*Fosen*, five actions). UTC's motions to dismiss all of those actions on the ground of *forum non conveniens* were granted by each of those courts; and Judge Broderick was so advised. The Courts of Appeals for the Third Circuit (*Dahl*), the District of Columbia Circuit (*Pain*) and the Second Circuit (*Fosen*) affirmed each dismissal; and Judge Broderick was so informed. Each district judge and all circuit judges in their deliberations passed on the identical facts and issues which were before Judge Broderick. Four opinions were written by those judges setting forth in great detail why those actions did not belong in United States courts. Nevertheless Judge Broderick refused to follow those opinions. Instead he sought to justify his denial of the motion with reasons which had been previously rejected not only by himself in *Abouchalache, supra*, but also by his own circuit in *Alcoa, Schertenleib, Farmanfarmaian, Collins* and *Fosen, supra*, by the District of Columbia circuit in *Pain, supra*, involving the same accident, and by the Third Circuit in *Dahl, supra*, invoiving the same facts and issues present in *Fiacco*. It is petitioner's contention that the District Judge's action was " 'so highly improper and undesirable' as to amount to the 'extraordinary circumstances' which require and justify the exercise of our power to issue the writ.' " *United States* v. *DeStefano*, 464 F.2d 845, 854 (2d Cir. 1972), citing and quoting from *United States* v. *Dooling*, 406 F.2d 192 (2d Cir. 1969).

Although a district court is not ordinarily bound by the decisions of the courts of appeals of another circuit it is the contention of petitioner that Judge Broderick was so bound by the decision of the Court of Appeals for the District of Columbia

in the companion case of *Pain* v. *United Technologies Corp., supra.* To say that Judge Broderick was bound by applicable decisions of only the Second Circuit and not by any other is a legal nicety which overlooks the fact that Federal Circuit Courts constitute a single system for the administration of justice.

> "When one Circuit Court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demands that it should be followed by District Courts until modified by the Appellate Court of the Circuit in which such District Court is located, or by the Supreme Court of the United States."

United States v. *Finazzo,* 429 F.Supp. 803, 808 (E.D. Mich. 1977); *Gustafson* v. *Wolferman, Inc.,* 73 F.Supp. 186, 192 (W. D.Mo. 1947).

Moreover, the decision of the District of Columbia Circuit in *Pain,* rejecting plaintiffs' identical arguments in a case arising out the same accident and ordering dismissal, had the effect of establishing the validity of the dismissal as the law of the case. See, 4 J. Moore, *Federal Practice* ¶0.404[8] at 531-32 (2d ed. 1974).

> "[The] law of the case is a sufficiently flexible doctrine that it permits departure where clearly warranted. But in the main there should be adherence to the prior ruling, for it is important that the type of issue involved be not subject to perpetual litigation." (Id. at 532 n.9)

Where five federal courts, two of them having coordinate jurisdiction with the Second Circuit Court of Appeals, have considered and rejected the same objections to dismissal raised by Mrs. Fiacco and the eight other Norwegian plaintiffs, there should be no reason to avoid applying the law-of-the-case doctrine as a sound rule of practice.

This is all the more appropriate in view of the district judge's surprising acknowledgment that "This district has, to be sure, the paradigm of a congested docket." (A-7). See, *Gulf Oil Corp.*

v. *Gilbert*, 330 U.S. 501, 508-9 (1947).[8] That legal wink will not be lost on the attorneys representing the plaintiffs in the litigation arising out of this accident. See, *e.g.*, *Pain* v. *United Technologies Corp.*, *supra*, 637 F.2d at 797, n.130 and its text. The district judge's decision will be considered an open invitation to foreign nationals who are injured in foreign accidents, and their New York attorneys, to sue in New York whenever they can obtain personal jurisdiction over an American manufacturer. If the Court of Appeals' refusal to review the district court's decision is allowed to stand then the federal judiciary's handwringing over congested dockets should be quietly put to rest for as long as a decision such as involved here is prevented from obtaining a meaningful appellate review. Such a departure by the district court from the accepted and usual course of judicial proceedings should not have been sanctioned by the court of appeals in this case. Therefore, for all the reasons set forth above, UTC's petition for a writ of certiorari to the Second Circuit Court of Appeals should be granted.

[8]It is surprising because the district judge went out of his way to add to that congestion by allowing a complicated products liability case to remain on that docket, involving, as it will, necessary, technical and time consuming depositions and other pre-trial discovery of liability witnesses in Norway, as well as a 5 to 6 week trial, rather than dismissing this action in favor of a trial in Norway limited *solely* to the issue of plaintiff's damages.

CONCLUSION

The Petition for a writ of certiorari should be granted and the order of the United States Court of Appeals for the Second Circuit denying United Technologies Corporation's petition for a supervisory writ of mandamus be reversed. That the action be remanded to the Court of Appeals with direction that the order of the United States District Court for the Southern District of New York denying petitioner's motion to dismiss on the ground of *forum non conveniens* be vacated and that said motion be granted under the terms and conditions previously agreed to by petitioner. And that petitioner have such other and further relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

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Appendix

APPENDIX TO PETITION

Order of Court of Appeals Denying Petition with Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 24th day of December, one thousand nine hundred and eighty-one.

No. 81-3066

In the Matter of
UNITED TECHNOLOGIES CORPORATION,
Petitioner,

ELEANOR M. FIACCO *et al.*,
Plaintiffs,

against

UNITED TECHNOLOGIES CORPORATION,
Defendant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-petitioner, United Technologies Corporation,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED, Judge Moore dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A Daniel Fusaro
Clerk
by Francis X. Gindhart
Chief Deputy Clerk

Order of Court of Appeals Denying Petition for Supervisory Writ of Mandamus

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re:

UNITED TECHNOLOGIES CORPORATION,

Petitioner

81-3066

A petition for a writ of mandamus having been filed,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Leonard P. Moore
U.S.D.J.
Jon O. Newman
U.S.D.J.
Charles H. Tenney
U.S.D.J.

Filed
Oct. 28, 1981
A. Daniel Fusaro
Clerk

Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

78 Civ. 3583(VLB)

MEMORANDUM ORDER

ELEANOR M. FIACCO, *et al.*,

Plaintiffs,

against

UNITED TECHNOLOGIES CORP.,

Defendant.

VINCENT L. BRODERICK, U.S.D.J.

I.

This is an action arising out of a crash which occurred while a helicopter was transporting plaintiffs' decedents from Bergen, Norway to an oil drilling platform in the North Sea.

Plaintiff Eleanor Fiacco, Administratrix of the Estate of Robert Fiacco, is a citizen and resident of the State of New York. Of the remaining eight plaintiffs, seven are Norwegian citizens, and one is a citizen of the United Kingdom.

The defendant is a United States corporation organized and existing under the laws of Delaware with its principal place of business in Connecticut. Defendant is presumably "doing business" in New York for purposes of personal jurisdiction, pursuant to New York CPLR §301, and for purposes of venue, pursuant to 28 U.S.C. §1391(c).[1]

[1]While there is no express allegation in the complaint or the amended complaint that defendant is doing business in New York, there is a reference to the fact defendant "just happens to do business in New York" (affidavit of John J. Martin, sworn to October 2, 1978, ¶7). Moreover, defendants have made no objections based on either lack of personal jurisdiction or improper venue.

The amended complaint alleges the following bases of jurisdiction: diversity of citizenship, the general maritime law, and the Death on the High Seas Act (46 U.S.C. §761 *et seq.*). The complaint sounds in strict liability in tort, negligence and breach of warranty.

Defendant asks this court to dismiss the action on the ground of *forum non conveniens*. Defendant asks alternatively that the action of plaintiff Fiacco be severed from the remaining actions, that the claims of the alien plaintiffs be dismissed on the ground of *forum non conveniens*, and that the Fiacco claim be transferred to Connecticut, pursuant to 28 U.S.C. §1404(a).[2]

Defendant has offered to concede liability and to submit itself to the jurisdiction of a competent Norwegian court, if this court will dismiss. Given these concession, defendant argues, this court is required, pursuant to the relevant factor analysis as dictated by the United States Supreme Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 505-509 (1947), to dismiss the instant action.

For the reasons given below, defendant's motion is in all respects denied.

II

In *Gulf Oil Corp.* v. *Gilbert, supra*, 330 U.S. 501 (1947), the United States Supreme Court outlined the factors to be considered in determining the issue of *forum non conveniens*:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important

[2]Section 1404(a) states:

§1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice a district court may transfer any civil action to any other district or division where it might have been brought.

> considerations are the relative ease of access to source of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Id. at 508 (footnote omitted).

Factors of public interest are to be considered as well:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 508, 509.

Defendant argues that since it is willing to concede liability and submit to *in personam* jurisdiction in the courts of Norway, the

only proof needed will go to the damages issue, and the bulk of the witnesses on this issue are located in Norway. While defendant concedes that the enforceability-of-judgment factor probably does not weigh in its favor, it urges that the remaining private, and most of the public interest, factors favor the defendant, given the concessions which it is willing to make.[3]

III

This is essentially a products liability suit and the alleged defective product was manufactured by a corporation whose principal place of business is in the United States. The site of the design and manufacture of the product, and all records relevant to such design and manufacture, are located in this country. With respect to design and manufacture, the potential witnesses are located in the United States.

So far as the accident itself, and the investigations which ensued, the witnesses are in Europe.

Witnesses and evidence with respect to damages as to plaintiff Fiacco are presumably to be found in the United States. With respect to damages as to the other plaintiffs, the witnesses and evidence are in Norway or the United Kingdom.

It is not yet established what body of law will control this action, but it could quite conceivably be the law of Norway. This becomes a so-called "practical problem" which can interfere with the "easy, expeditious and inexpensive" trial of a case.[4]

[3]Similar arguments were made to the United States District Court for the District of Columbia in a wrongful death action arising out of the same helicopter crash, and defendant prevailed. The Court of Appeals for the District of Columbia, in affirming the district court's decision, held that given the concessions offered (essentially equivalent to those involved here), the factors favoring dismissal on *forum non conveniens* grounds outweighed those factors favoring retention of the case in the forum chosen by plaintiffs. *Pain* v. *United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980).

[4]*Gulf Oil Corp.* v. *Gilbert, supra,* 330 U.S. at 508.

Turning to the factors of public interest, one of the primary functions of diversity jurisdiction is to give a plaintiff of a given state access to a federal court for purposes of vindicating claims as against citizens of other states. This much is apparent from the language of the diversity statute itself.[5]

This district has, to be sure, the paradigm of a congested docket. This is not, however, a case where a community which bears no relation to the litigation has the duties and expenses of jury trial imposed upon it. The community served by this court has a clear interest in providing a forum in which one of its citizens may seek to redress a wrong.

IV

Absent the considerations delineated below, a balance of the *Gulf Oil Corp* v. *Gilbert* factors would perhaps indicate that Norway rather than New York was a more appropriate forum. Given these considerations, however, I find that it would not be appropriate to dismiss on *forum non conveniens* grounds.

The first is that the plaintiff Fiacco is a citizen of New York, and hence has a real and tangible interest in this forum.[6] This factor augments in this case the weight which normally should be given to the plaintiff's choice of forum.

---

[5]28 U.S.C. §1332.

[6]In attaching importance to the plaintiff's residence I am not unmindful of authority in this circuit and elsewhere which tends to deemphasize the significance of the plaintiff's citizenship or residence as a factor in determining the appropriate forum. *See Alcoa S.S. Co.* v. *M/V Nordic Regent*, No. 1558 Docket No. 78-7054 (2d Cir. Feb. 25, 1980) (en banc); *Farmanfarmian* v. *Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978), and I do not accord to Mrs. Fiacco's citizenship a "talismanic significance." Perhaps Mrs. Fiacco's New York citizenship alone would not have been enough to persuade me to deny defendant's motion.

I note that in *Pain* v. *United Technologies Corp.*, *supra*, 637 F.2d 775, none of the plaintiffs resided in the District of Columbia. One plaintiff was an American citizen residing in New Hampshire.

The second consideration is a crucial one, which tips strongly in favor of retention of jurisdiction in this district.

If plaintiffs had commenced this action against defendant in Norway, defendant could have resisted, probably successfully on the basis that defendant was not subject to jurisdiction in Norway. On this view, not only Fiacco but also all of the other plaintiffs would necessarily have come to this court, or to another district in the United States which had jurisdiction over defendant, in order successfully to proceed against defendant. Thus this is not a situation where plaintiffs could have proceeded against defendant in the Southern District of New York or in Norway and elected instead to proceed in this district. They could not have proceeded against defendant in Norway absent defendant's consent to submit to jurisdiction there. The fact is that defendant has consented to submit to jurisdiction in Norway, and has sweetened the offer by agreeing to concede liability if the action is transferred there. If there were not clear jurisdiction over defendant in this and other forums within the United States, however, query whether defendant would have been willing to submit to jurisdiction in Norway.

Obviously defendant wishes transfer of the action to Norway because it has made a value judgment that it will be advantageous for it to have damages assessed in Norwegian courts rather than in American courts. Perhaps where there are two forums, each with jurisdiction, the court in determining whether a transfer should be made on a *forum non conveniens* basis should not consider the question of the relative criteria used in the two jurisdictions for determining liability and assessing damages. *See e.g., Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1025 (1976). Where of two possible forums one is possible only because the defendant consents to make it possible by submitting to its jurisdiction, it seems to me that the question of those relative criteria should weigh much more heavily. A plaintiff, who jurisdictionally has the right to proceed in one jurisdictionfi should not, in my judgment, be re-

quired to proceed if at all only in another jurisdiction where jurisdiction will exist not as a matter of law but as a matter of conscious choice on the part of the party against whom he seeks recovery.

SO ORDERED.

Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
July 18, 1981

Statement by United Technologies Corporation in Accordance with Rule 28.1

Pursuant to Rule 28.1 of the Revised Rules of this Court petitioner United Technologies Corporation sets forth the following statement:

United Technologies Corporation has no parent company. The following corporations are subsidiaries and affiliates of United Technologies Corporation which are not wholly owned by it:

Packard Instrument Pty. Ltd.
Packard Instrument S.P.A.
Airco Engineering (Proprietary) Limited
Carrier S.P.A.
Carrier Italia S.P.A.
S. P. Elettronica S.P.A.
Conwaste Disposal Services Sdn. Berhad
Entrol Systems Sdn. Berhad
Shinwa Sangyo (S) Pte. Ltd.
Colex (Singapore) Pte. Ltd.
Caricor R. Arcondicionado e Refricao do Brasil Ltda.
Marlo S.P.A.
Carrier Air Conditioning (Holdings) Limited
Carrier Air Conditioning (New Guinea) Pty. Limited
Carrier Saudi Service Company
Carrier Thermo Fig Corporation Elizondo, S.A.
Manufacturas Especializadas, S.A.
Elevadores Otis S.A.
ETSCO Ltd.
Home Capital Funds, Inc.
Uniklima
Tokyo Ink Manufacturing Company, Ltd.
Perseroan Terbatas Indoaircon
Toyo Carrier Engineering Co., Ltd.
Turbica S.A. de C.V.
Essex Electricas Industriales, S.A. de C.V.
Aismalibar, S.A.
Mecanismos Auxiliaries Industriales, S.A.

Statement by United Technologies Corporation in Accordance with Rule 28.1

Essex Transducers Corporation
Industrial Electrical Specialties, Inc.
Autosense Equipment, Limited
Hamilton Standard Limited
Hamilton Standard Stork B.V.
Auto Make-Up S.A.R.L.
Inmont G.m.b.H.
Inmont S.A.
Colores e Derivados, S.A.
Inmont – Industrias Quimicas Limitada
Inmont do Brasil – Comercio e Participacoes Limitada
Inmont S.A.
Mondial Paint S.A.
Interchem-Tokyo (South East Asia) Limited
IPI. Sendirian Berhad
Nippon Renshed-Mason Co. Ltd.
Tintas Graficas S.A.
Turborreactores, S.A. de C.V.
ISS de Mexico S.A. de C.V.
Mostek France S.A.R.L.
Otis Europe S.A.
Ascendes S.A.
Ascenseurs Clerebout S.A.
Essener Aufzugsfabrik Bruno Haack G.m.b.H.
L'Enterprise Telephonique
Le Telephone Automatique
Teletechnique
Establissements Camus
Otis Moroc S.A.
SARI Otis (Maintenance), S.A.
SARI Otis (Gestion), S.A.
Flohr-Otis Aufzuege G.m.b.H.
Jan. Hamer Company
Guide Rails Pty. Ltd.
Freissler Otis Machinen und Aufzugefabrik
Otis Elevator Company S.A.E.

Statement by United Technologies Corporation in Accordance with Rule 28.1

Saxby S.A.
Manuservice, S.A.R.L.
Matral Saxby Manutention, S.A.
Construction Mecaniques et Hydrauliques de Vendee S.A.
Otis Elevator Company (India) Limited
Nippon Otis Elevator Company
Ascensores Otis S.A.
Sito Realty Company, Inc.
Zardoya Otis, S.A.
Ascenseurs Gendre-Otis S.A.
National Trading Corporation S.A.L.
Otis Elevator Company
Porvair Limited
Fishburn Printing Ink Company, Ltd.
Precilec S.A.
Pratt & Whitney Aircraft of Canada Limited
SCAN Marine Inc.
Ratier-Forest/G.S.P.
Societe Nationale d'Etude et de Construction de Moteurs d'Aviation
Pratt & Whitney Aircraft do Brasil Ltda.
United Technologies International S.C. Ltda.
UTIO Nigeria, Ltd.
United Technologies International S.A.R.L.
Nostosiirto Oy
United Technologies Saudi Arabia, Ltd.

Opposition

NO. 81-1766

Supreme Court, U.S.
FILED
APR 23 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED TECHNOLOGIES CORPORATION,

Petitioner,

against

ELEANOR M. FIACCO, etc., *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Attorney for Respondents

Of Counsel:

GERALD A. ROBBIE
DONALD I. MARLIN

Dated: April 19, 1982

Question Presented

Whether the Court of Appeals' denial of petitioner's application for the extraordinary remedy of mandamus to review a discretionary *forum non conveniens* decision warrants review by this Court.

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NO. 81-1766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED TECHNOLOGIES CORPORATION,

Petitioner,

against

ELEANOR M. FIACCO, Individually, as mother of DANIEL MARTIN FIACCO and JAY MICHAEL FIACCO, and as Administratrix of the Estate of ROBERT J. FIACCO,

and

KARI TONNENSSEN, Individually, as mother of EIVIND TONNESSEN and RUNE TONNESSEN, and as Personal Representative and Adminstratrix in fact of the Estate of BJORN TONNESSEN, deceased,

and

THERESE BERTHELSEN, Individually, as mother of LEONARD BERTHELSEN and TROND BERTHELSEN, and as Personal Representative and Administratrix in fact of the Estate of REIDAR OSVALD JOHAN BERTHELSEN, deceased,

and

WENCH ESPELAND, Individually, as mother of UNNI ESPELAND and JAN ERIK ESPELAND, and as Personal Representative and Administratrix in fact of the Estate of STEINAR ESPELAND, deceased,

and

KARI GJERTSEN, Individually, as mother of BENEDIKTE LOUSE GJERTSEN and ALEXANDER GJERTSEN, and as Personal Representative and Administratrix in fact of the Estate of MAGNUS GJERTSEN, deceased,

and

OLGA PRESTHAUG, Individually and as Personal Representative and Administratrix in fact of the Estate of HANS PRESTHAUG, deceased,

and

ODLANG ESTHER THACKWELL, Individually, as mother of HELEN SOLVEIG THACKWELL, LISS BARBARA THACKWELL and BIBBI MARY THACKWELL, and as Personal Representative and Administratrix in fact of the Estate of JAMES ARTHUR THACKWELL, deceased,

and

MARGRETHE VERLO, Individually, as mother of MORTON GUNNAR VERLO, and as Personal Representative and Administratrix in fact of the Estate of GUNNAR VERLO, deceased,

and

MARGUN WOEBBEKIND, Individually, as mother of ANITA WOEBBEKIND, and as Personal Representative and Administratrix in fact of the Estate of KNUT MORTEN WOEBBEKIND, deceased,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

In addition to the opinion discussed by petitioner, an unreported opinion was rendered by a United States Magistrate recommending to the district court that the *forum non conveniens* motion be denied. A copy of that opinion is set forth in the Appendix hereto at 1a, *infra*.

Summary of Argument

This collateral proceeding was initiated by petitioner's application for an extraordinary writ of mandamus to overturn the denial of discretionary *forum non conveniens* relief. The Court of Appeals summarily denied petitioner's application, without opinion. A suggestion for rehearing *en banc* was rejected.

As will be developed, the denial of mandamus presents no special or important considerations which command the attention of this Court. Even if that extraordinary remedy is available to review a *forum non conveniens* decision, issuance of the writ is largely within the discretion of the Court of Appeals. *E.g., Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976); *Schlangenhauf* v. *Holder*, 379 U.S. 104, 112 n.8 (1964). In a similar vein, the underlying denial of the motion to dismiss a suit commenced by an American citizen against an American manufacturer for a product defect entails a high degree of judicial discretion. *See, e.g., Piper Aircraft Co.* v. *Reyno*, —— U.S. ——, 70 L.Ed.

2d 419 (1981). Simply put, this case involves two layers of rather ordinary and proper discretionary determinations which do not warrant review on a writ of certiorari.

ARGUMENT

Without issuing a written opinion, the Court of Appeals summarily denied petitioners' application for an extraordinary writ of mandamus to compel a discretionary *forum non conveniens* dismissal. Since the Court of Appeals enjoys a large measure of discretion in passing upon mandamus applications, its denial of the writ amounts to no more than an ordinary and appropriate exercise of discretionary power. *See, e.g., Kerr* v. *United States District Court,* 426 U.S. 394, 403 (1976); *Schlagenhauf* v. *Holder,* 379 U.S. 104, 112 n. 8 (1964).

In rejecting petitioner's unusual request, the Court of Appeals was in harmony with the guiding philosophy of federal appellate practice: piecemeal review of trial court decisions is to be avoided. *E.g., Kerr* v. *United States District Court,* 426 U.S. at 403. Indeed, the policy against reviewing interlocutory or intermediate determinations is embodied in an Act of Congress, which generally restricts the appellate jurisdiction of the Court of Appeals to final judgments of the District Courts. 28 U.S.C. §1291. As this court has recognized on numerous occasions, review of non-final decisions by way of mandamus " 'runs the real risk of defeating the very policies sought to be furthered by that judgment of Congress.' " *Allied Chemical Corp.* v. *Daiflon Inc.,* 449 U.S. 33, 36 (1980) (quoting *Kerr* v. *United States District Court,* 426 U.S. at 403).

Not surprisingly, therefore, mandamus is a jealously guarded remedy. It is rarely if ever an appropriate vehicle for review of a discretionary trial-level decision. *See, e.g., Allied Chemical Corp.* v. *Daiflon Inc.*, 449 U.S. at 36 (1980); *Will* v. *Calvert Insurance Co.*, 437 U.S. 655, 666 (1978) (plurality opinion). Quite simply, the enormous potential for abuse, delay and disruption counsels that the availability of mandamus be rigorously circumscribed. On this basis alone, the Court of Appeals soundly exercised its discretion when it denied the mandamus application.

By the same token, the underlying decision which petitioner seeks to have reviewed by this unusual procedure—disposition of a *forum non conveniens* motion—is itself a matter addressed to the discretion of the district court. *E.g., Piper Aircraft Co.* v. *Reyno*, —— U.S. ——, 70 L.Ed.2d 419, 436 (1981); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 511-512 (1947); *Koster* v. *Lumberman's Mut. Cas. Co.*, 330 U.S. 518, 531 (1947). Only recently, this Court emphatically underscored the flexibility, and wide discretionary latitude, inherent in the *forum non conveniens* doctrine. *Reyno*, 70 L.Ed.2d at 431-432, 436. In *Reyno* the Court explicitly refrained from adopting "a rigid rule to govern discretion" which would have sapped the *forum non conveniens* device of its valuable flexibility. Rather, the Court reaffirmed that each case must turn upon its own facts and circumstances. *Id.* at 432.

Given the flexibility and discretionary nature of the *forum non conveniens* inquiry, petitioner's allegation of error in the district court decision would not fare well even on a direct appeal following final judgment. Petitioner's principal thesis—that the district court was obligated to dismiss without conducting its own independent inquiry

because other courts had seen fit to dismiss allegedly similar actions—is simply untenable. Such an argument misapprehends the fundamental and unique flexibility of the *forum non conveniens* concept. It ignores the critical necessity for conducting an independent evaluation in each case to determine whether any of the peculiar facts and circumstances tip the delicate balance in favor of or against dismissal. *See, e.g., Gilbert,* 330 U.S. at 508; *Williams* v. *Green Bay & Western R.,* 326 U.S. 549, 557 (1946). Petitioner's position, in short, would replace the flexibility of the *forum non conveniens* doctrine with the rigors of a stare decisis-like concept.

The argument thus confuses discretionary decisions with binding legal authority. None of the *forum non conveniens* cases cited purport to announce anything approaching a rule of law which find application here. To the contrary, those cases merely hold, in a host of discrete situations, either that the particular facts warranted a discretionary refusal to entertain the cause or that no abuse of discretion was present.*

Indeed, of the three cases relied upon by petitioner which are even remotely pertinent to the present situation, two involve an entirely different accident whose cause was unknown, *Dahl* v. *United Technologies Corp.,* 632 F.2d 1027 (3d Cir. 1980); *Fosen* v. *United Technologies Corp.,* 633 F.2d 203 (2d Cir.) *aff'g without opinion,* 484 F. Supp. 490

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* The District of Columbia Circuit, in upholding a *forum non conveniens* dismissal in *Pain* v. *United Technologies Corp.,* 637 F.2d 775 (D.C. Cir. 1980) *cert. denied,* 102 S.Ct. 980 (1981), was careful to point out that "our review in this matter is limited" and would not "substitute its judgment for that of the district court in the absence of a clear abuse of discretion." *Id.* at 799. Most significantly, the Court acknowledged that it was not deciding a "pure question of law." *Id.* at 781.

(S.D.N.Y. 1980), while the third was commenced in a forum having no connection whatsoever with the litigation. *Pain* v. *United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 102 S.Ct. 980 (1981). And, in one case not cited by petitioner, which arose out of the same tragedy as the instant action, a state court utilizing the same *forum non conveniens* principles as federal courts declined to dismiss the action. *Kahn* v. *United Technologies Corp.*, No. 247120 (Super. Ct. Conn. March 3, 1981) (set out in the Appendix hereto at 22a). It is therefore apparent that different, yet supportable, discretionary decisions may be reached in each of these cases, and the mere existence of cases dismissing allegedly similar suits does not mechanically compel a dismissal here.

At bottom, then, petitioner's quarrel is with the fundamental discretionary nature of the *forum non conveniens* doctrine. Under petitioner's view, the district court would have been without discretion to deny the motion, and *forum non conveniens* relief would have been granted as of right. However unsupportable that contention might be on an appeal after judgment, it provides an especially weak foundation for an extraordinary mandamus proceeding. Confronted with such an argument, the Court of Appeals wisely exercised its discretion by refusing to grant the writ and by refusing to open yet another fertile avenue to tactical delay. Most important, however, the essentially discretionary decision of the Court of Appeals, coming on top of the discretionary determination of the district court, presents no issue of law for review and no special or important consideration warranting the attention of this Court.

CONCLUSION

Petitioner has not shouldered its burden of identifying special or important considerations warranting review on certiorari. The underlying decision of the district court is an ordinary, garden variety, discretionary denial of a motion to dismiss on *forum non conveniens* grounds. The writ of mandamus sought in the Court of Appeals is likewise a discretionary remedy which was properly denied. Beyond those two layers of discretion, there are no legal issues involved in this litigation. Accordingly the petition for a writ of certiorari should in all respects be denied.

Respectfully submitted,

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Dated: April 19, 1982

Appendix

APPENDIX

Opinion of the United States Magistrate Recommending Denial of the *Forum Non Conveniens Motion*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ELEANOR M. FIACCO, Individually as mother of DANIEL MARTIN FIACCO and JAY MICHAEL FIACCO, and as Administratrix of the Estate of ROBERT J. FIACCO, deceased,

AND 8 OTHER CLAIMS,

Plaintiffs,

—against—

UNITED TECHNOLIGIES CORP.,

Defendant.

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78 Civ. 3583 (VLB)

RECOMMENDED DECISION ON DISMISSAL OR TRANSFER

SINCLAIR, Magistrate:

In this products liability suit for punitive and compensatory damages arising out of the June 26, 1978 crash

of a Sikorsky helicopter in the North Sea, allegedly caused by the metal-fatigue failure of the sleeve-spindle component of the helicopter rotor-hub, the defendant, United Technologies Corp. ("United"), has moved to dismiss under the doctrine of *forum non conveniens,* and for alternative relief. For the reasons set forth below, the principal motion should be denied and no lesser of alternative relief appears warranted.

I

Diversity Jurisdiction

A. *Simple Diversity.*

It is undisputed that United is a corporation duly organized pursuant to the laws of the State of Delaware with its principal place of business in Connecticut. Plaintiffs' Amended Complaint at 3; Defendant's Memorandum of Law in support of Motion to Dismiss at 3. The diversity jurisdiction of this Court arising under 28 U.S.C. §1332(a)(3) is thus based upon factual averments that plaintiff Eleanor M. Fiacco is a citizen and domiciliary of New York, that plaintiffs Tonnessen, Berthelson, Espeland, Gjertsen, Presthaug, Verlo and Woebbekind are citizens and domiciliaries of Norway and that plaintiff Thackwell is a citizen and subject of the United Kingdom. Plaintiffs' Amended Complaint at 3.

B. Suits By Aliens.

Defendant baldly states in its papers and oral argument that the foreign plaintiffs have no basis for su-

ing in United States Courts and that they should be relegated to Norwegian courts. As to plaintiff Fiacco, this argument rests on the dubious premise[1] that her change of domicile from Norway to New York after the crash is ineffective to establish citizenship here. The latter issue is of no moment, however, for even assuming that *all* plaintiffs herein are aliens, access to United States courts would not be denied them in suing a United States defendant.

At oral argument counsel for United could do no more than repeat the exasperating *ipse dixit* that the foreign plaintiffs have no right to sue here. As a matter of diversity jurisdiction, however, the authors of *Federal Courts and the Federal System,* 2nd ed., note that suits by aliens against United States citizens domiciled outside the forum state have been permitted as a matter of course since 1789. *Id.* at 1061.

C. Significance Of The Treaty.

In this connection the court cannot ignore the Treaty between the United States and Norway, *signed* June 5, 1928, 47 Stat. 2135, 2136-37a at arts, I, II. These pro-

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[1] Defendant argues (see Reply Affidavit of John J. Martin, dated November 17, 1978 at 3) that, because plaintiff Fiacco was not a resident of New York at the time of the accident she is not a domiciliary in the requisite sense. Since the seminal case of *Morris* v. *Gilman,* 129 U.S. 315 (1889), however, an actual *bona fide* change of domicile involving both physical presense and the requisite intention to remain will render the motives underlying the change immaterial to determinations of diversity jurisdiction. 1 Moore's Federal Practice ¶ 0.74 [3.-4].

visions, in pertinent part, assure Norwegians access to United States courts:

> The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.
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> • • •
>
> With respect to that form or protection granted by National, State or Provincial laws establishing civil liability for bodily injuries or for death, and giving to relatives or heirs or dependents of an injured party a right of action or a pecuniary compensation, such relatives or heirs or dependents of the injured party, himself a national of either of the High Contracting Parties and within any of the territories of the other, shall regardless of their alienage or residence outside of the territory where the injury occurred, enjoy the same rights and privileges as are or may be granted to nationals, and under like conditions.

Id. See Kaku Nagamo v. *McGrath,* 187 F. 2d 759, 766 (7th Cir. 1951). *Compare* the construction given to a comparable "access" provision in the German-American treaty, *Buechold* v. *Ortiz,* 401 F. 2d 371, 372 (9th Cir. 1968).

The Second Circuit's recent decision in *Farmanfarmaian* v. *Gulf Oil,* —— F. 2d —— (2nd Cir. December 18, 1978, slip op. at 703) expressly comments on the alien's right of access to Federal Courts and the impact of a

treaty such as that between the United States and Norway:

> We feel constrained to comment, however, on statements in the judge's opinion to the effect that a foreign plaintiff's "right to sue in the United States is clearly of a lesser magnitude than that of an American citizen." 437 F. Supp. at 923, 927. Whatever the merits of that proposition generally, which does find some support in cases suggesting that our courts should be quite cautious in dismissing on forum non conveniens grounds when suit is brought by an American citizen, see, e.g., *Olympic Corp.* v. *Societe Generale,* 462 F. 2d 376, 378 (2nd Cir. 1972), we think it has no application where, as here, a treaty between the United States and the foreign plaintiff's country allows nationals of both countries access to each country's courts on terms no less favorable than those applicable to nationals of the court's country. 8 United States Treaties and Other International Agreements 900, 902-03 (1957).

Id. at 708. The court declined to reverse Judge Carter's decision because it expressly found that he "*applied the same forum non conveniens standards as would be applied were the plaintiff an American citizen.*" *Id.* (emphasis added).

Opinion of the United States Magistrate Recommending Denial of the Forum Non Conveniens Motion

II

Forum Non Conveniens

Defendant argues that applicable case law supports its assertion that plaintiffs' action should be dismissed under the doctrine of *forum non conveniens* and moved to Norway. *See* Defendant's Memo at II. At the outset, it should be noted that the plaintiff's choice of forum should rarely be disturbed, indeed, only when a review of the circumstances discloses a balance of conveniencies strongly in favor of another forum. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 450, 508 (1947). *See also Schertenleib* v. *Traum*, —— F.2d —— (2d Cir. December 15, 1978, slip op. at 668). In *Gulf Oil*, the Supreme Court enumerated several factors to be considered in a determination under the doctrine of *forum non conveniens*, including the existence of another more convenient forum, the ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining the attendance of willing witnesses and the possibility of view of the premises if applicable. *Gulf Oil Corp.* v. *Gilbert*, *supra* at 508.

A. *Special Doctrines Governing Forum Non Conveniens Where An American Citizen (Or One Who Stands In His Shoes) Would Be Forced To Litigate In Foreign Courts.*

Courts of the United States are reluctant to apply the doctrine of *forum non conveniens* where application would compel an American citizen to seek remedies in a foreign

court. *See Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F. 2d 1326, 1344 (2d Cir. 1972); *Vanity Fair Mills* v. *T. Eaton Co.,* 234 F. 2d 633, 646 (2d Cir. 1956), *cert. denied,* 352 U.S. 871 (1956), *reh. den.* 352 U.S. 913 (1956). The trend is thus to dismiss actions on *forum non conveniens* grounds only when plaintiffs, who are citizens or residents of foreign countries, or sureties thereof, sue *alien* defendants in United States courts. See *Top Form Mills* v. *Sociedad Nationale Ind., Etc.,* 428 F. Supp. 1237, 1253 (S.D.N.Y. 1977); *Olympic Corporation* v. *Societe Generale,* 462 F. 2d 376, 379 (2d Cir. 1972); *Garis* v. *Compania Maritima San Basilo, S.A.,* 386 F. 2d 155, 157 (2d Cir. 1967); *accord, Texaco Trinidad, Inc.* v. *Astro Exito Navegacion, S.A.,* 437 F. Supp. 331, 334 (S.D.N.Y. 1977). As discussed above, a treaty providing for access requires the courts to give covered aliens the benefit of the same legal standards. *Farmanfarmaian, supra* at 708.

The defendant's reliance upon *Noto* v. *Cia Seculadi Armanento,* 310 F. Supp. 639 (S.D.N.Y. 1970) in the Reply Affidavit of John J. Martin (Nov. 17, 1978) at 8, is thus misplaced. In that case, all the plaintiffs and all the defendants were foreign. Judge Weinfeld, in determining liability for deaths and injuries caused by the explosion of an Italian-owned tanker in an Iranian port due to the alleged negligence of the Dutch corporate owner of the port's terminal facilities, dismissed on the ground of *forum non conveniens* because complex issues of foreign law were deemed to govern whether an Iranian oil consortium could be held liable, and because the claims asserted against the named defendants were deemed "palpably specious" and "legally baseless." 310 F. Supp. at 648-49.

Opinion of the United States Magistrate Recommending Denial of the Forum Non Conveniens Motion

B. *The General Approach Of Gulf Oil* v. *Gilbert.*

Even if the case is not viewed under the specifically applicable rule above, there is no showing here which would satisfy the general criteria set out in *Gulf Oil.* A matter of prime importance, of course, is the very choice of forum itself. The selection by plaintiff of this forum weighs heavily against dismissal. *See Gulf Oil Corp.* v. *Gilbert, supra* at 508; *Schertenleib* v. *Traum, supra* at 668; *Leasco Data Processing Equipment Corp.* v. *Maxwell, supra* at 1344; *Vanity Fair Mills* v. *T. Eaton Co., supra* at 645. An analysis of the parties' arguments with respect to access to sources of proof yields a mixed bag of conveniences and inconveniences which, on the whole, does not strongly favor either side. Defendant points out that the helicopter wreckage and the owner/operator's maintenance, operational and flight crew training records are in Norway. *See* Affidavit of John J. Martin at 6-7. Although these factors are of no minor import, all of these items are transportable. Indeed, some important physical evidence has already been brought to the United States for analysis. That the recovered wreckage happens to have been taken to Norway hardly justifies moving the trial there. Either relevant portions of the rotor spindle or the entire helicopter could easily be brought to this country. Moreover, Norway is obviously not the situs of the other elements of proof in that this is, in essence, a products liability action and the helicopter's design, structural analysis, fatigue analysis, testing and fabrication were all carried out here in the United States (specifically, Stratford, Connecticut), not in Norway. *See* Plaintiffs' Answering Affidavit at 9-10. Presumably, the records pertaining to these manufacturing processes as

well as the maintenance program plans are also in Connecticut.

If the availability and cost of obtaining attendance of witnesses weighs more heavily on either side, it would appear to favor the United States as a forum. Defendant notes that the members of the Norwegian Civil Aviation admistration and certain other witneses are in Norway. Affidavit of John J. Martin at 6-7. However, as plaintiffs have indicated, the flight crew is, unfortunately, deceased and all remaining percipient witnesses are from the United States. Even post-hoc witnesses involved in the crash investigation are heavily United States-weighted in quality and number. A team comprised of Sikorsky personnel was sent from Connecticut to Norway to provide technical help in the investigation.[2] Plaintiffs' Answering Affidavit at 10-11. In addition, at least one part of the fracture surface from the wreckage was brought back to Connecticut for study by Glen Lattin, Chief Material Engineer of Sikorsky. *Id.* at 12. Plaintiffs also cite the November 6, 1978 letter from the Norwegian Civil Aviation Authority to plaintiffs' correspondent attorneys in Stavanger, Norway. *Id.* at 12, Exhibits 4A and 4B. Accordingly, plaintiffs allege that 20 Sikorsky employees attended a meeting at Stratford, Connecticut along with Norwegian and American government representatives and Helikopter Service A.S. representatives. *Id.* at 12-13.

The foregoing discussion demonstrates that a great many potential witnesses are located in the United States and

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[2] Plaintiffs note that one of the members of the investigation team was summoned from Aberdeen, Scotland. Plaintiffs' Answering Affidavit at 11.

that no clear advantage has been established to warrant the conclusion that Norway would, on the whole, serve as a substantially more convenient forum with respect to likely witnesses at trial.

Under the dismissal criteria set forth in *Gulf Oil Corp.* v. *Gilbert, supra,* the inability to compel the personal attendance of witnesses, resulting in the extensive use of the depositions of numerous witnesses, is one factor to be balanced with a variety of others. 330 U.S. at 512. It is apparent that, in fact, the instant case involves far fewer potential witnesses than the number predicted to be called to the trial in *Gulf Oil. See generally id. Compare Fitzgerald* v. *Texaco,* 521 F. 2d 448, 451 (2d Cir. 1975), *cert. denied,* 423 U.S. 1052 (1976) [eyewitnesses not subject to subpoena power one factor for dismissal]. However, even if the defendant in the present case were ultimately to be required to rely on deposition testimony of more unavailable foreign witnesses than the plaintiffs, this factor alone would not be dispositive of a motion to dismiss under *forum non conveniens. See Dale Metals Corp.* v. *Kiwa Chem. Industry Co., Ltd.,* 442 F. Supp. 78, 81)S.D.N.Y. 1977). The facts of this case, moreover, preclude the plausibility of its characterization as a localized controversy, touching the affairs of many persons only in Norway, since the affairs of many persons in at least three countries are affected.

The inability of the defendant United to join Helikopter, S.A. as a third party defendant in a United States forum (Defendant's Memorandum at 24) is a factor favoring dismissal—but it remains only one of the many variables the court must place in the balance. *See Gulf Oil Corp.* v. *Gilbert, supra* at 572. In the cognate context of

transfer between federal districts, the inability to implead in a forum has been held to be simply one among the numerous important elements to be considered; it is *not* a "conclusive consideration in favor of the party seeking transfer that third-parties cannot be joined in the pending action in the transferring forum." *United States* v. *Casey,* 420 F. Supp. 273, 277 (S.D. Ga. 1976). *See also Fitzgerald* v. *Westland Marine Corp.,* 369 F. 2d 499, 501-02 (2d Cir. 1966) (in *forum non conveniens* inability to implead was only one of several factors considered).

United has made no showing that the liberal courts of Norway, before whom United would like the entire action to proceed, would not take jurisdiction over an action by United for contribution or indemnity in the event that United is held liable in the present action. There is no fundamental unfairness to United, therefore, inhering in this court's retention of jurisdiction instead of remitting the matter to Norway. *Compare Olympic Corporation* v. *Societe Generale,* supra at 379; *Degeas* v. *American President Lines, Ltd.,* 178 F. Supp. 131, 132 (S.D.N.Y. 1959).

Finally, the argument that Norway represents a more appropriate forum based upon the burden to the Norwegian plaintiffs of travel to the United States (*see* Reply Affidavit of John J. Martin at 6-7), is rendered moot by the demonstrated willingness on the part of these plaintiffs to travel to this country. Furthermore, it is not clear that the burden and expense of transporting the Norwegian plaintiffs to the United States would significantly outweigh that of transporting the United States personnel to Norway.

With regard to the inherent difficulties entailed in the application of foreign law in a United States court, it

has not yet been determined to what extent, if any, Norwegian law will apply to the issues presented in this action. Thus, the Court is confronted with the perplexing task of measuring before the fact the scope of difficulty to be encountered in the proof and application of an unforeseeable quantum of Norwegian law. However, even assuming, *arguendo,* that the *defendant's* contentions on the applicability of Norwegian law prevail at trial, the degree of difficulty presented by the specific application of foreign law in this case is not likely to be so overwhelming, even when taken in conjunction with the other factors discussed herein, as to provide the exceptional showing necessary to overturn plaintiffs' choice of forum.

Nor would the ultimate determination of whether the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761 et seq. (1978), provides the exclusive remedy to plaintiffs disturb the balance of factors which favor their choice of forum. Thus, whether the plaintiffs would be permitted to recover punitive damages under Connecticut law (predicated upon an artful reading of the Supreme Court's recent decision in *Mobil Oil Corp.* v. *Higginbotham,* 436 U.S. 618 (1978 [*but see The Public Administrator of the County of New York* v. *Angela Compania Naviera, S.A.,* —— F. 2d —— (2d Cir. January 16, 1979; Slip Op. at 957)]) does not affect the threshold determination of whether plaintiffs' is a proper choice of forum. This case raises neither such complex issues of the scope of damages to be awarded nor of the applicable substantive law to be referred to, as to be overwhelmingly burdensome to this Court.

Schertenleib v. *Traum, supra,* where the Court came to the opposite conclusion on different facts, can be distin-

guished from the case at bar in at least two respects. First, the parties in *Schertenleib* agreed that foreign law would be applied to the tort claims in that action. *Id.* at 680. Thus, there was no uncertainty resulting from any unresolved conflict of laws dispute, and the Court of Appeals for the Second Circuit was able to place great weight upon the established element of which body of law would govern.

Perhaps more significant is the explicit reluctance of the Court in *Schertenleib* to embroil itself in resolving the "numerous questions of Swiss law" before it. *Id.* at 680. In that case, the Court was faced with a complex array of arcane issues of Swiss law including, *inter alia*: abuse of the process of the court and the Attorney General in Geneva, Switzerland; the parameters of "prima facie tort" under Swiss law arising out of the defendant's allegedly false testimony in Geneva; and defamation, based on the same testimony. *Id.* at 664. Also complicating the Court's task in *Schertenleib* were such relevant Swiss legal issues as disloyal management, qualified breach of trust, extortion and forgery. *Id.* at 665 n.5. The Court also noted that there were a number of proceedings in Geneva involving precisely the same factual matters at issue in *Schertenleib,* and that the litigants already had Swiss counsel "well versed in the complicated factual details" of that dispute. *Id.* at 680.

Thus, while there can be no doubt that proof of Norwegian law in the case at bar would be burdensome, there is no suggestion that the difficulties would be of the same order of magnitude as in *Scherteinleib.* Even if, moreover, Norwegian Law were to control any of the substantive issues between any of the parties, the necessity of

applying foreign law would not be sufficient reason to dismiss the action under the doctrine. *See Top Form Mills, supra* at 1253. Thus, here, where alien plaintiffs have chosen to sue an American defendant in American courts, the requirements for *forum non conveniens* are not met.

C. *Effect of the Alcoa Decision.*

The "wide discretion" of the court in evaluating *forum non conveniens* motions (*Farmanfarmaian, supra* at 707) appears to have been drastically cut back under the decision on rehearing filed January 10, 1979 in *Alcoa Steamship Company, Inc.* v. *M/V Nordic Regent,* —— F.2d —— (2d Cir. January 10, 1979, Slip Op. at 5367). The majority there holds that, at least in an admiralty context, the *Gulf Oil* decision and its companion decision, *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), are now interpreted in the case of *resident plaintiffs* to preclude dismissal in favor of foreign litigation except where there is "*positive evidence of unusually extreme circumstances making it materially unjust to the defendant that jurisdiction be retained in the American courts.*" *Alcoa, supra,* slip op. at 5372. Indeed, the court holds that inconvenience will *never* satisfy the standard without a showing of the specific intent of plaintiff to vex or harass. *Id.* The dissenting judge construes the majority language to grant the protected class of litigants "an *absolute immunity* from dismissal on the ground of forum non conveniens—no matter how conclusively the long recognized balancing factors may point toward another more appropriate forum." *Id.* at 5375 (Timbers, J., dissenting; emphasis in original). Whether the doctrine applies to

all litigants who invoke the admiralty and maritime jurisdiction (as Judge Timbers laments, *id.*) is not necessary to resolve for the purposes of this case, since it clearly applies to resident plaintiffs and those who stand in that relationship to United States courts. *See id.* at 5369-73.

A petition for Rehearing En Banc was filed at 5:05 p.m. on January 24, 1979, the last day to do so, seeking yet another review of the *Alcoa* issues. The present case need not await the results of such petition since, under *any* of the three analytical approaches discussed in this section, defendant's motion to dismiss plaintiffs' action under the doctrine of *forum non conveniens* should be denied.

III

Severence

United seeks alternative relief in the form of an order severing and transferring the Fiacco claim to Connecticut under 28 U.S.C. §1404(a) and dismissing the foreign plaintiffs on the ground of *forum non conveniens.* Since no sufficient showing has been made to warrant dismissal as to the foreign plaintiffs (*see* point II above), the alternative relief sought must be denied. Moreover, a fair reading of the parties' submissions reveals a substantial likelihood that many, if not all, of the same issues, witnesses and documents relating to this action pertain equally to Mrs. Fiacco and each of the eight other plaintiffs. Thus, dismissal of the claims of any of the plaintiffs would ultimately result in duplication of effort, albeit in a foreign state's forum, and in unnecessary in-

convenience, burden and expense on both the parties and their witnesses. *See National Super Spuds* v. *New York Mercantile Exch.*, 425 F. Supp. 665, 667-68 (S.D.N.Y. 1977); *Wyndham Associates* v. *Bintliff*, 398 F. 2d 614, 619 (2d Cir. 1968), *cert. denied*, 393 U.S. 977 (1968). For these reasons, as well as for the reasons set forth in section II, *supra*, defendant's motion for alternative relief as stated should be denied. Consideration of §1404(a) transfer as to Mrs. Fiacco *and* the other plaintiffs is set forth below.

IV

Transfer Under §1404(a)

Defendant has refrained from seeking alternative relief in the form of an order under §1404(a) that the *entire* case (*i.e.*, as to *all* plaintiffs) be transferred to Connecticut. The concept has superficial appeal and such a transfer could be effected by this District *sua sponte* if the court were to determine that the requisite showings had been made. *See Watwood* v. *Barber*, 70 F.R.D. 1, 7 (D.C. Ga. 1976); *Monsanto Co.* v. *United Gas Pipe Line Co.*, 360 F. Supp. 1054, 1056 (D.C.D.C. 1973). The analysis below evaluates the possible transfer to the District of Connecticut for the benefit of the Court and parties and to avoid requiring defendant to file a renewed motion, if such a transfer were to be felt an attractive option after the disposition of the presently pending applications for relief. As will be seen in more detail below, the requirements for transfer are *not* met and the action should remain in this District in any event.

Opinion of the United States Magistrate Recommending Denial of the Forum Non Conveniens Motion

Whether to transfer an action under §1404(a) to another district where it might have been brought is to be determined by the standard of whether the transfer is in the interests of justice and the convenience of the parties and witnesses.[3] Moreover, the burden, although less than the showing required under *forum non conveniens*, is on the movant.[4]

The balancing test of convenience is not merely based upon a numerical comparison of factors, but is left also to the discretion of the court.[5] The factors, analogous to those enumerated in *Gulf Oil Corp* v. *Gilbert, supra*, include, in addition to the convenience to parties and witnesses, the relative ease of access to sources of proof, the availability of process to compel attendance of unwilling witnesses, the cost of obtaining unwilling witnesses and the practical problems indicating where the case can be tried more expeditiously and inexpensively. *See Schneider* v. *Sears*, 265 F. Supp. 257, 263; *Gulf Oil Corp.* v. *Gilbert, supra* at 508.

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[3] 1A Moore's Federal Practice ¶0.145 [5] (2d ed. 1977). Plaintiffs' choice of forum, an overriding factor under *forum non conveniens*, must be weighed together with other considerations in a determination of a motion to transfer. *See Y's Design, Ltd.* v. *Regensteiner Pub. Enterprises*, 428 F. Supp. 1067, 1070 (S.D.N.Y. 1977).

[4] 1A Moore's Federal Practice, *supra* note 3, at ¶0.204. *See Schneider* v. *Sears*, 265 F. Supp. 257, 263 (S.D.N.Y. 1967).

[5] *Williams Gold Refining Co., Inc.* v. *Semi-Alloys, Inc.*, 434 F. Supp. 453, 457 (W.D.N.Y. 1977).

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In *Baksay* v. *Rensellear Polytech Institute,* 281 F. Supp. 1007 (S.D.N.Y. 1968), the court was faced with a situation similar to that of the present case. The plaintiff in that case was a Connecticut resident bringing suit in the Southern District for money damages predicated on an incident which occurred on the defendant's premises in Troy, New York (in another District within the State of New York). Defendant moved for a transfer to the District where the accident occurred. Citing *Peyser* v. *General Motors Corp.,* 158 F. Supp. 526, 529, the court held that the defendant must make a clear-cut showing that, when all the interests of the parties are considered, trial would more conveniently proceed, and the interests of justice would be better served, in the transferee district. *Baksay* v. *Rensellear Polytech Institute, supra* at 1010. The court found the defendant had not shown how it would, in fact, be inconvenienced were the case to be tried in the Southern District; nor had the defendant specified which witnesses, if any, would be unable to attend the trial, what testimony they would be expected to provide and how relevant and necessary their testimony would be. *Id.* Thus, "[a] mere statement that witnesses would be inconvenienced if trial were held in the [forum district] is plainly insufficient." *Id. citing Peyser* v. *General Motors Corp., supra* at 529; *Schmidt* v. *American Flyers Airline Corp.,* 260 F. Supp. 813, 814 (S.D.N.Y. 1966). Furthermore, the primary element of a clear-cut showing of the convenience and justice to be enhanced by transfer to another district is to be evidenced by the submission of "affidavits detailing the names and location of the potential principal witnesses and the substance of their testimony, so that the court may evaluate—not speculate upon—the actual probability of securing the asserted increased convenience offered by the pro-

posed transferee district." *Riso Kagaku Corporation* v. *A.B. Dick Co.*, 300 F. Supp. 1007, 1010 (S.D.N.Y. 1969). *See Car Freshener Corp.* v. *Auto Aid Mfg. Corp.*, 438 F. Supp. 82, 85 (N.D.N.Y. 1977); *National Super Spuds* v. *New York Mercantile Exch.*, *supra* at 668; *National Tea Co.* v. *The Marseille*, 142 F. Supp. 415, 416 (S.D.N.Y. 1956); *cf. Shulof* v. *Westinghouse Elec. Corp.*, 402 F. Supp. 1262, 1264 (S.D.N.Y. 1975) [failure to name witnesses not necessarily fatal].

The court's discretionary determination regarding a §1404(a) transfer is one of "particularized judgment based on the unique features of the specific case." *Thomson* v. *McKinnon & Minyard*, 291 F. Supp. 573, 576 (S.D.N.Y. 1968). *See also Riso Kagaku Corporation* v. *A.B. Dick Co.*, *supra* at 1010. In the present case, it is not manifestly clear that any great advantage would be reaped from a transfer to the District of Connecticut. Although it may be the case that factors such as ease of access to sources of proof and expense of obtaining the presence of witnesses may favor trial in Connecticut, the relatively short distance between Stratford, Connecticut and New York City does not pose such great inconvenience to the defendant to warrant upsetting the plaintiffs' choice of forum. It is thus not enough that certain factors lean in favor of the defendant, who "must tip the scale substantially in his favor to upset plaintiff's choice." *Jones Knitting Corporation* v. *A. M. Pullen & Company*, 50 F.R.D. 311, 316 (S.D. N.Y. 1970), *citing Gulf Oil* v. *Gilbert*, *supra* at 508; *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329, 330 (2d Cir. 1950) *cert. denied*, 340 U.S. 851 (1950); *Schmidt* v. *American Flyers Airline Corp.*, *supra* at 815.

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Therefore, although certain factors militate in favor of transfer, they are not controlling, especially since the plaintiffs would be as inconvenienced by a trial in Connecticut as the defendant would be by the requirement that they appear in this court for trial. *See First National City Bank* v. *Nanz, Inc.*, 437 F. Supp. 184, 189 (S.D.N.Y. 1975). *Compare Teleprompter Corp.* v. *Polinsky*, 447 F. Supp. 53 (S.D.N.Y. 1977) [transferee forum was the only district in which National Bank could be sued under statute]; *Credit Alliance Corp.* v. *Nationwide Mutual Insurance Co.*, 433 F. Supp. 688 (S.D.N.Y. 1977) [operative facts had no material connection with transferor forum]; *Haase* v. *Mallenkrodt, Inc.*, 415 F. Supp. 889 (S.D.N.Y. 1976) [no connection between action and any person or place within forum]. The conclusion which may be drawn at this juncture is that defendant has not shown the convenience of witnesses to be a strong factor in its favor. A transfer of the entire litigation *sua sponte* to the District of Connecticut is, therefore, unwarranted. Defendants have, however, not specifically sought the form of alternative relief now under consideration. Thus, the conclusion is without prejudice to any further showing defendants may choose to make.

Pursuant to 28 U.S.C. §636, as amended, the parties shall have ten days within which to lodge written objections to the foregoing Report with the Honorable Vincent L. Broderick. Such objections should be filed with the Clerk of the Court, with extra copies delivered to the

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Chambers of Judge Broderick, Room 654, and the Chambers of the undersigned, Room 431.

Dated: New York, New York
February 9, 1979

KENT SINCLAIR, JR.
United States Magistrate

Opinion of the Connecticut Superior Court in *Kahn* v. *United Technologies Corporation*

SUPERIOR COURT

JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN AT HARTFORD

March 3, 1981

No. 247120

INGJERD KAHN,ET AL.

vs.

UNITED TECHNOLOGIES CORPORATION

MEMORADUM OF DECISION
(MOTION TO DISMISS)

The instant action sounds in tort and is a product liability claim. The action arises out of the June 26, 1978 crash of a Sikorsky transport helicopter en route from Bergen, Norway to an oil platform in the North Sea. Each of the plaintiffs is suing as the ancillary administratrix of her decedent's estate and individually as a surviving spouse.

The action is currently before the court on the defendant's motion to dismiss. While conceding that in personam jurisdiction over the named parties and subject

matter jurisdiction over the controversy lies with this court, defendants, nevertheless, urge dismissal of the action on the ground of forum non conveniens.

The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute when it appears that the cause before it may be more appropriately tried elsewhere. *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 506, 507 (1947).

The court is faced with a threshold issue of whether or not the doctrine of forum non conveniens should apply in Connecticut. The United States Supreme Court has stated that a state court "may in appropriate cases apply the doctrine of forum non conveniens." *Broderick* v. *Rosner,* 294 U.S. 629, 643; *Williams* v. *North Carolina,* 317 U.S. 287, 294, n. 5. The Supreme Court has also approved the use of the doctrine in the federal courts, *Gulf Oil Corp.* v. *Gilbert,* supra; *Koster* v. *Lumbermens Mutual Co.,* 330 U.S. 518 (1947).

The Michigan Supreme Court, in *Cray* v. *General Motors Corp.,* 207 N.W. 2d 393 (Mich. 1973) at 397, counted twenty-one states which follow the doctrine. In that case, the court was faced with the issue of whether the doctrine should apply in Michigan. In holding that the doctrine should apply, the court stated:

> In this era of proliferation of litigation bearing upon almost all facets of our personal, governmental and business communities, the site of the litigation may well go to the heart of justice itself. In some cases, there also may be a question as to the enforcibility of a judgment, once obtained. But

> states do not have the advantage given to the federal courts whereby such cases can be transferred to other states as an administrative matter. Id., p. 398.

This court is in agreement with the logic expressed above. It is therefore the opinion of this court that the doctrine of forum non conveniens should apply in Connecticut.

> The principle of forum non conveniens establishes the right of a court to resist imposition upon its jurisdiction although such jurisdiction could properly be invoked. It presupposes that there are at least two possible choices of forum. Id.

An action must not be dismissed unless a suitable alternative forum is available to the plaintiff. Restatement 2d Conflict of Laws, § 84c. The defendant claims that a suitable alternative forum is available to the plaintiff in Norway.

The plaintiffs originally brought an action against the defendant in the United States District Court for the District of Columbia. The defendant moved to dismiss on the ground of forum non conveniens. The trial court, after noting the existence of possible alternative forums with jurisdiction over the action, including Connecticut and Norway, dismissed the action. On appeal the United States District Court for the District of Columbia affirmed the dismissal.

It is important to note that the dismissal was based on several significant conditions, as reflected by the decision

of the United States Court of Appeals in affirming the dismissal:

> By entering dismisal only on the condition that UTC agree to submit to the jurisdiction of the various foreign courts of appellants' choice, Judge Hart ensured that the defendant would both appear and defend in an alternative forum. By requiring the defendant not to contest liability in those foreign jurisdictions and to proceed to trial only on the issue of damages, he exacted a concession from UTC as the price for permitting it to shift the case from plaintiffs' chosen forum. By requiring waiver of foreign statute of limitations, he effectively forced UTC to waive any advantage it might have gained from delay. —— U.S. App. D.C. Reports —— (Nov. 17, 1980).

Subsequent to the dimissal, the plaintiffs instituted this action. In a memorandum in opposition to the motion to dismiss, the defendant correctly points out that the only way they could get personal jurisdiction over the defendant in Norway is by the consent of the defendant. The plaintiffs argue that to order a dismissal in favor of a venue in which the plaintiffs could not have properly begun an action against a defendant would allow defendant forum shopping, citing *Hoffman* v. *Blaski*:

> We recognize, of course, that venue may be waived under proper circumstances, but we do not think it can be waived in a forum in which an action has not and could not have been properly brought by the opposing party. To hold otherwise is so permit a defendant to select a forum not available to a plain-

> tiff as a matter of right, and over plaintiff's objection. *Hoffman* v. *Blaski*, 260 F. 2d 317, 321 (7th Cir. 1958), aff'd., 363 U.S. 335 (1960).

The defendant argus that the *Hoffman* case is distinguishable since it deals only with the statutory transfer of venue from one federal district to another under 28 U.S.C. § 1404a. The logic of that case applies equally to the instant action, however. If a defendant should not be permitted to transfer an action to a forum not available to a plaintiff as a matter of right and over plaintiff's objection then there should certainly be a reluctance to dismiss the action under the same circumstances.

The relationship between 28 U.S.C. § 1404(a) and the doctrine of forum non conveniens was discussed in *Jones* v. *Rockwell International Corp.*, a September 4, 1980 decision of the United States District Court for the District of Connecticut. (A copy of that decision is included in this file as exhibit B):

> A party moving for transfer of forum under § 1404(a) bears a lesser burden than a party moving for dismissal under the somewhat analogous doctrine of *forum non conveniens*. . . . The plaintiff's choice of forum, moreover, is entitled to a substantial weight on a § 1404(a) motion and should not lightly be overturned. Id., p. 3.

Consequently, a plaintiff's choice of forum is entitled to even greater weight when ruling on a motion to dismiss on the ground of forum non conveniens. The concern as to forum shopping by a defendant is present whether the motion is to transfer pursuant to § 1404(a) or to dismiss

on the ground of forum non conveniens. The concern is particularly important in ruling on the present motion as there may be significant differences between the laws of this state and those of the proposed alternative forum in regard to the collateral source rule and the availability of punitive damages.

In view of that fact that the defendant has cited several cases in which courts have conditioned dismissal on a defendant's consent to jurisdiction in a more convenient forum, this court is of the opinion that it also has the power to dismiss this action on a conditional basis. As that conclusion raises the possibility that Norway could be an adequate alternative forum, it is appropriate, at this time, to address the factors to be considered in ruling on a motion to dismiss based on forum non conveniens.

> Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.
>
> If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be

appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as the enforcibility of a judgment if one is obtained. The court will weight relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. *Gulf Oil Corp.* v. *Gilbert,* supra, pp. 508, 509 (footnotes omitted).

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In weighing the factors to be considered in ruling on this motion, it is obvious that several factors weigh in favor of granting the defendant's motion. Compulsory process for the attendance of unwilling witnesses from Norway is not available to the defendant. The cost of obtaining attendance of willing witnesses from Norway would be high. The fact that the defendant would be unable to implead HeliKopter, a Norwegian corporation, is a factor which weighs against the retention of jurisdiction. The importance of the inability to implead HeliKopter is lessened by the fact that the plaintiffs' action may be based upon strict liability and by the fact that the defendant could bring an action against HeliKopter for indemnity in Norway if judgment is rendered against the defendant in this forum.

There are a number of factors which weigh strongly in favor of retention of jurisdiction. The plaintiffs' claim is based on product liability. The helicopter was designed by engineers employed by the defendant, whose principle place of business is in Connecticut. The helicopter was manufactured, assembled, tested and inspected in Connecticut. Plans, blueprints and records of production are in Connecticut. Persons involved in the engineering, manufacturing and testing of the helicopter are in Connecticut.

Representatives of the defendant who inspected parts from the helicopter wreckage are in Connecticut, as are their reports. All of these factors favor retention of jurisdiction.

As to factors of public interest, the court is of the opinion that there is a strong public interest in having a Connecticut court, as opposed to a Norwegian court,

address this product liability claim. The helicopter was manufactured and tested in Connecticut. The Federal Aviation Administration of the United States issued to the defendant a "type certificate," certifying the type of helicopter involved in this crash as airworthy. Any burden of jury duty is outweighed by the interest of this state in the safety of products manufactured here.

The defendant has argued that the law of Norway will be applicable to this action, and that the case shou'd therefore be dismissed. It is not necessarily true that the law of Norway will be ruled applicable. *See,* Restatement 2d, Conflict of Laws §§ 6, 145; *Johnson* v. *Spider Staying Corporation,* 555 P. 2d 997, 1000, 1001 (1976). Even if the law of Norway is applicable, however, that is not cause for dismissal. "It is settled that the mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the court." *Hoffman* v. *Goberman,* 420 F. 2d 423, 427 (1970).

After naming the factors to be considered in ruling on a motion to dismiss on the grounds of forum non conveniens, the United States Supreme Court, in *Gulf Oil Corp.* v. *Gilbert,* supra, stated ". . . unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.*

Upon reviewing these factors in the instant action, this court is not of the opinion that the balance is strongly in favor of the defendant.

Accordingly, the motion to dismiss is denied.

O'Donnell, J.